NO. 19826

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN WILLIAM WHALEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING

APPEAL FROM
THE UNITED STATES COURT OF APPEALS
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

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United States Attorney,
JOHN K. VAN DE KAMP,
Assistant U. S. Attorney,
Chief, Criminal Division,
ROBERT L. BROSIO,
Assistant U. S. Attorney,
Assistant Chief, Criminal Division,
PHILLIP W. JOHNSON,
Assistant U. S. Attorney,

600 U. S. Court House,
312 North Spring Street,
Los Angeles, California 90012,

Attorneys for Appellee,
United States of America.

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TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND THE HONORABLE CIRCUIT JUDGES BARNES AND ELY AND JUDGE MADDEN OF THE UNITED STATES COURT OF CLAIMS:

Comes now the UNITED STATES OF AMERICA, appellee in the above-entitled cause, and, pursuant to the provisions of Rule 23 of the Rules of the United States Court of Appeals for the Ninth Circuit, petitions the panel which rendered the decision in the above-entitled cause, which said opinion was filed June 28, 1966, for a rehearing on the following grounds:

Appellant having alleged that the evidence before the trial Court was insufficient, and having failed to include a proper record, sufficient to enable the appellate Court to determine the validity or invalidity of his position, he has waived his claim of insufficient evidence.

Springer v. Best, 264 F. 2d 24, 28 (9th Cir. 1959).

Speaking for the Court in Springer, supra, Judge Barnes stated:

"We conclude that there is no rule requiring the transcript, or even a part of it, to be part of the record on appeal, but it is clear that this Court can decide only questions which can be determined from what record there is before it. All others must be presumed waived."

Springer, supra, footnote 2 at pp. 27-28 (Emphasis added).

Speaking for the Court in Union Pacific Railroad Co. v. Bridal Veil Lumber Co., 219 F. 2d 825, 833 (9th Cir. 1955), cert. denied, 350 U. S. 981 (1956), Judge Chambers stated:

"In the absence of a record of the testimony, this court assumes that the evidence supports a complete verdict. Bernards v. Johnson, 9 Cir., 103 F. 2d 567; Rickard v. Thompson, 9 Cir., 72 F. 2d 807."

A similar view appears in Clark v. Milens, 32 F. 2d 1004 (9th Cir. 1929).

" 'All possible presumptions are indulged to sustain the action of the trial court. It is, therefore, elementary that an appellant seeking reversal of an order entered by the trial court must furnish to the appellate court a sufficient record to positively show the alleged error.'"

United States v. Vanegas, 216 F. 2d 657, 658 (9th Cir. 1954).

"It is the appellant's duty to bring up a record that discloses error. Every intendment should be in favor of the lower court's judgment."

Hardt v. Kirkpatrick, 91 F. 2d 875, 878 (9th Cir. 1937), cert. denied, 303 U. S. 626 (1938).

Where the appellant asserts insufficiency of the evidence to support the action of the trial court, he has the burden of bringing the

evidence to the appellate court in order to meet the burden of showing grounds for reversal.

Jernigan v. Southern Pacific Company, 222 F. 2d 245, 248-49 (9th Cir. 1955); Springer v. Best, supra, 264 F. 2d 24, 29; In re Chapman Coal Co., 196 F. 2d 779, 785 (7th Cir. 1952).

"In the absence of the production of all the evidence, under well-known rules, we must presume that the unreported evidence was sufficient to sustain the judgment."

In re Ripp, 242 F. 2d 849, 851 (7th Cir. 1957) (Emphasis added).

The presumption of regularity is applied to affirm judgments or orders attacked upon the ground of insufficient evidence, where the evidence is not brought to the attention of the appellate court.

Bakersfield Abstract Co. v. Buckley, 100 F. 2d 530, 531-32 (9th Cir. 1938); Bank of Eureka v. Partington, 91 F. 2d 587, 590 (9th Cir. 1937); Aetna Ins. Co. v. Rhodes, 170 F. 2d 111, 115 (10th Cir. 1948).

Appellee did not move to dismiss the appeal. The decision not to do so was a proper one under the circumstances:

"A further ground of dismissal urged by appellee is that the assignments of error raise questions which could not be decided without examining the evidence, and that the evidence is not in the record. This, if true, would be a ground of affirmance, not of dismissal."

Bank of Eureka v. Partington, supra, 91 F. 2d 587, 589 (9th Cir. 1937) (Emphasis added).

The records of this Court will show that on or about March 30, 1965, appellee moved for an Order to Supplement the Record Upon Appeal at the expense of appellant. Appellant did not appear in

opposition to this Motion. The Motion was granted, except for the question of expense.

Appellant had a legal duty to furnish the additional portion of the transcript:

"It is clear that it is incumbent upon the appellant to file the additional parts of the reporter's transcript and that there is no duty imposed upon the appellant to furnish the parts of the transcript which he desires to have added to the record. If the appellant fails to file the additional parts, the court, on motion of the appellee, may require the appellant to furnish them."

United States v. Brodbeck, 139 F. 2d 916, 917-18 (3rd Cir. 1944) (Emphasis added).

This quotation from Brodbeck, supra, is based upon the Federal Rules of Civil Procedure, Rule 75(b), requiring the appellant to file a copy of the entire transcript if the appellee so desires. The same rule would apply in criminal cases, under the provisions of Rule 39(b)(1) of the Federal Rules of Criminal Procedure.

Appellee's attempt to remedy appellant's default in regard to the record upon appeal herein is discussed in the affidavit accompanying appellee's Motion to Continue Hearing and For Extension of Time To File Brief, filed herein on or about June 2, 1966. This affidavit mentioned the fact that the Court Reporter had passed away and that efforts had been made to obtain a complete transcript.

Since appellant's counsel informed this Court during oral argument on June 6, 1966, that he had had contact with the Court Reporter (Mr. Vaughan) on certain dates, a certified copy of the Certificate of Death of Mr. Vaughan is attached to the original copy of the within

brief, showing that Mr. Vaughan's death occurred on February 28, 1965. Since appellant's brief herein was filed on March 10, 1965, it was already too late for appellee to remedy appellant's default in failing to order a transcript of all of the testimony (see appellant's affidavit of March 12, 1965)!

The only alternative to dismissal of the appeal would be additional proceedings in the trial court in an effort to provide an accurate record. Such a procedure is outlined in United States v. Jones Coal Company, 325 F. 2d 877 (6th Cir. 1963).

CONCLUSION

In conclusion, it is respectfully submitted that either the judgment of conviction herein should be affirmed or the within cause should be remanded to the trial court for further proceedings in accordance with the rule in Jones Coal Company, supra.

In the alternative, in view of the exceptional procedural circumstances of the instant case, it is respectfully submitted that a new trial should be ordered so that appellee may have a legal ruling upon all of the evidence rather than those portions hand-picked by the adversary. An appellate Court has wide discretion under 28 U. S. C. A. 2106 to order a new trial in the interests of justice. A new trial may be ordered in cases of insufficiency of the evidence.

Wright v. United States, 250 F. 2d 4, 10 (C. A. D. C. 1957).

Appellee also requests that the opinion herein be modified to omit the reference to the Government's failure to file a brief. The brief was not due, as the Clerk of the Court herein notified appellee that the brief was not due until after the completion of the transcript (see Appendix "A" to this brief).

For the foregoing reasons, appellee respectfully submits that a rehearing of this cause should be ordered.

Respectfully submitted,

MANUEL L. REAL,
United States Attorney,
JOHN K. VAN DE KAMP,
Assistant U. S. Attorney,
Chief, Criminal Division,
ROBERT L. BROSIO,
Assistant U. S. Attorney,
Assistant Chief, Criminal Division,
PHILLIP W. JOHNSON,
Assistant U. S. Attorney,

Attorneys for Appellee,
United States of America.

CERTIFICATE

Pursuant to the provisions of Rule 23 of the United States Court of Appeals for the Ninth Circuit, I, Ronald S. Morrow, Assistant United States Attorney, attorney for appellee, certify that in my judgment the foregoing Petition for Rehearing is well founded, and I further certify that the filing thereof is not interposed for the purpose of delay.

/s/ Ronald S. Morrow

RONALD S. MORROW
Assistant United States Attorney

"APPENDIX A"

Office of the Clerk
U. S. Court of Appeals
For the Ninth Circuit
San Francisco, California 94101

May 11, 1965

Phillip W. Johnson, Esquire
Assistant U. S. Attorney
U. S. Custom and Court House
San Diego, California 92101

John W. Whaley v. U.S.A.
No. 19826
D.C. 32377 SD

Dear Mr. Johnson:

In reply to your letter of May 7, undoubtedly you are correct in your statement that the time to file your brief will not commence to run until the transcript is completed.

I regret having bothered you about its filing.

Very truly yours,

Frank H. Schmid

Frank H. Schmid, Clerk